

95-155

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In re:

Transaction Network Services, Inc.,  
TSYS Acquiring Solutions, LLC, and  
Electronic Payment Systems, LLC

Regarding FCC Jurisdiction and  
RespOrg Responsibilities to Comply  
with Part 52 of the FCC's Rules and  
the SMS/800 Tariff Requirements

To: Office of the Secretary  
Attn: Chief, Wireline Competition Bureau

WCB Docket No. \_\_\_\_\_

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Federal Communications Commission  
Office of the Secretary

PETITION

TSYS ACQUIRING SOLUTIONS, LLC

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Dated: January 24, 2011

### Summary

TSYS Acquiring Solutions, LLC ("TSYS") is a major processor of payment card transactions (credit and debit cards) and the subscriber of record for numerous toll free numbers through which local merchants transmit data to have their customers' payment card transactions processed. Transaction Network Services, Inc. ("TNS"), the RespOrg for some of these toll free numbers, recently received a "Writ of Execution" from the U.S. District Court for the Eastern District of Virginia demanding that TNS transfer to Electronic Payment Systems, LLC ("EPS") "Toll-free 1-800 numbers 800-370-8507, 877-488-0358 and 800-411-6902 and all documents necessary to provide Electronic Payment Systems, LLC with immediate and continuous ownership, control, and access to said numbers." TSYS is the subscriber of record for these and four other toll free numbers which EPS is demanding TSYS hand over as the result of a binding arbitration over a fee dispute in Arizona and subsequent court actions to enforce it.

The transfer of the seven toll free numbers sought by EPS would of course violate the Commission's prohibition on such transfers, as well as the SMS/800 Tariff, and EPS's efforts to use the courts to circumvent the FCC are clearly intended to accomplish what the FCC will not permit. In addition to the Writ in Virginia, on January 25th, 2011, there is a hearing scheduled in the federal district court in Arizona to consider a Motion to Compel filed by EPS demanding that TSYS transfer these toll free numbers to EPS. Also to be considered at that hearing is a Motion to Stay and a Supplemental Motion to Stay from TSYS requesting that the court stay any further action with regard to the toll free numbers while, among other things, the FCC exercises its exclusive jurisdiction over the subject matter to address the issues raised by the actions of EPS.

Whether the stay is granted does not affect the need for Commission action here. Instead, it merely affects how quickly the FCC would need to respond to enforce its rules and prevent

widespread harm. If the stay is not granted, expedited action from the Commission is critical to preserving the integrity of the Commission's Rules and the SMS/800 Tariff, as well as to avoid immense harm to the public and innocent third parties. **The TSYS toll free numbers at issue in this proceeding are used by over 750,000 merchants throughout the U.S., processing over One Billion payment card transactions per year.** This represents nearly 12% of the businesses in the U.S., and on a typical day, TSYS processes over \$150 million dollars in payment card transactions through these toll free numbers. It is critical to these local businesses and their customers, which are in turn critical to the U.S. economy, that these payment card transactions go through.

TSYS therefore petitions the Commission to exercise its exclusive jurisdiction over toll free numbering and provide confirmation to the parties that (1) a party may not seek to evade the FCC's exclusive jurisdiction and rules regarding the handling of toll free numbers through collection actions in federal district courts seeking an "ownership" or other interest in another party's toll free numbers; (2) RespOrgs may not, without explicit authority from the FCC, transfer toll free numbers between unaffiliated subscribers; and (3) efforts by EPS to require the transfer of toll free numbers for which TSYS is the subscriber of record violate the Commission's Rules and the SMS/800 Tariff, and are contrary to the public interest, particularly where such a transfer would cause severe disruption to payment card transactions and adversely impact millions of Americans that would be affected daily.

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**PETITION**

TSYS Acquiring Solutions, LLC ("TSYS") is a major processor of payment card transactions (credit and debit card) and the subscriber of record for numerous toll free numbers through which local merchants transmit data to have their customers' payment card transactions processed. As discussed in more detail below, TSYS hereby petitions the Commission to exercise its exclusive jurisdiction over toll free numbering and provide confirmation to the parties that (1) a party may not seek to evade the FCC's exclusive jurisdiction and rules regarding the handling of toll free numbers through collection actions in courts seeking an "ownership" or other interest in another party's toll free numbers; (2) RespOrgs may not, without explicit authority from the FCC, transfer toll free numbers between unaffiliated subscribers; and (3) efforts by Electronic Payment Systems, LLC ("EPS") to require the transfer of toll free numbers for which TSYS is the subscriber of record violate the Commission's Rules and the SMS/800 Tariff, and are contrary to the public interest, particularly where such a transfer would cause severe disruption to payment card transactions throughout the United States, harm over

750,000 local merchants that rely on the orderly processing of payment card transactions to conduct their business, and adversely impact millions of consumers.

**I. Background**

**A. TSYS and Its Toll Free Numbers Are Critical to Merchants Across the U.S.**

TSYS is one of the largest processors of payment card transactions in the U.S., processing the front end (authorization) and back end (settlement) of payment card transactions. Many merchants, particularly small businesses, use point of service payment card readers that rely on dial-up connections to relay payment card and transaction data to TSYS so that payment card transactions can be processed and the merchant can be paid. To accommodate this need, TSYS has a pool of toll free numbers for which it is the subscriber of record that are used to provide dial-up payment card processing. Each local point of service payment card reader has a primary toll free number and typically a secondary or backup toll free number embedded in its software. When a merchant runs a customer's payment card through the reader, the device calls TSYS on its set toll free number and relays the payment card and transaction information to TSYS so that the merchant can obtain authorization for the transaction. Transaction Network Services, Inc. ("TNS") and Verizon are the RespOrgs for the TSYS toll free numbers involved in this proceeding.

TSYS does not have a contractual relationship with the merchants using its toll free numbers. Instead, when a merchant wishes to be able to process payment card transactions, it typically signs a contract with an Acquiring Bank, either directly or through an Independent Sales Organization ("ISO") (collectively, the "Acquirer"), to obtain the point of service equipment and associated processing services necessary to process payment card transactions. In turn, the Acquirers who may not have their own processing systems will enter into a contract

with a processor like TSYS to provide the services needed for payment card processing, including providing proprietary software for the point of service card readers to be able to communicate with the authorization and settlement equipment of that processor.

As a result, the toll free numbers maintained by TSYS and made available for use by merchants are the "pipes" through which payment card and transactional data flows. In processing the authorization and settlement of payment card transactions for local merchants, TSYS is fulfilling its processing obligations to Acquirers, who in turn are fulfilling their obligation to provide their client merchants with the ability to accept payment card payments from their customers.

Through such arrangements, the TSYS toll free numbers at issue in this proceeding are used by over 750,000 merchants throughout the U.S., processing over One Billion payment card transactions per year. This represents nearly 12% of the businesses in the U.S. On a typical day, TSYS processes over \$150 million dollars in payment card transactions through these toll free numbers. It is critical to these businesses, which are in turn critical to the U.S. economy, that these payment card transactions go through.

**B. Recent Actions by an ISO Have Required the Filing of This Petition**

In 2005, an independent sales organization by the name of Electronic Payment Systems, LLC entered into a Processing Services Agreement with TSYS. TSYS then began the process of working with EPS to convert EPS's merchants to use of the TSYS card processing system. As part of that process, EPS selected the toll free numbers (from the list of numbers held by TSYS) that were programmed into its merchants' point of service payment card readers. EPS placed most of its merchants on three of the TSYS toll free numbers, but scattered some of its merchants

across several other TSYS toll free numbers. EPS has continued to do this with new merchants it has signed up since that time.

TSYS has remained the primary processor for EPS since 2005. However, EPS merchants represent a tiny portion of the businesses that use TSYS's dial-up processing. For example, in November of 2010, on the primary three TSYS numbers for which TNS is the RespOrg, 2,450 EPS merchants processed approximately 164,079 transactions, whereas approximately 573,000 *non-EPS* merchants processed 70.2 *million* transactions on just those three toll free numbers.

After repeated fee disputes between TSYS and EPS, the parties entered into binding arbitration proceedings in 2008 to resolve the fee issues. In early 2009, the arbitrator found in favor of EPS, and ordered TSYS to pay approximately \$3 million to EPS. TSYS subsequently paid EPS that amount in satisfaction of the arbitrator's award.

In addition to the financial award, however, EPS asserted during the arbitration that TSYS had verbally promised to provide EPS with an exclusive toll free number for its merchants' payment card processing. TSYS disputed that claim, noting among other things that the parties' Processing Services Agreement included an "integration clause" stating that "This Agreement constitutes the entire agreement between the parties hereto relating to the subject matter hereof and all prior negotiations, agreements, and understandings, whether oral or written, are superseded hereby." Despite this express contractual language, the arbitrator ruled that there had been a verbal agreement that TSYS would provide the toll free number used by EPS, and the arbitration award included the following language:



5. The Arbitrator orders TSYS to provide EPS with immediate and continuous ownership, control and access to the toll free 1-800 number that connects EPS' merchants to a processor.<sup>1</sup>

Since this arbitration ruling was released, it has become clear that the arbitrator was unaware that EPS had been programming a variety of TSYS's toll free numbers into its merchants' point of sale payment card devices, and that as a result, "the toll free 1-800 number that connects EPS' merchants to a processor" does not exist. It has since been determined that EPS is using seven of TSYS's toll free numbers to provide its merchants with payment card processing services.<sup>2</sup> Moreover, because all of these were existing TSYS toll free numbers, none are exclusive to EPS merchants, and in fact, EPS merchants represent only a tiny portion of the transactions transmitted over any of these numbers.

Given these facts, TSYS concluded that the most reasonable interpretation of the language from the arbitration award was that TSYS was required to obtain such a number for EPS's exclusive use. In October of 2009, TSYS offered to satisfy the arbitrator's award by procuring for EPS a dedicated toll free number for use exclusively by EPS merchants. EPS rejected that offer the very next day, asserting that it wanted the existing number (that actually did not exist) referenced in the arbitration order.

As EPS sought to enforce the arbitration award regarding the toll free number in court, TSYS sought to have the binding arbitration award vacated. Unfortunately for TSYS, the Federal Arbitration Act intentionally makes it extremely difficult to overturn a binding arbitration decision, and TSYS's efforts to do so were rebuffed. TSYS subsequently sought to

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<sup>1</sup> See *TSYS Acquiring Solutions, LLC v. Electronic Payment Systems, LLC*, Order, Doc. 59 in Case No. 2:09-CV-00155-JAT (D. Ariz. 2010), at 7 (lines 22-24).

<sup>2</sup> The seven toll free numbers are: 800-370-8507, 877-488-0358, and 800-411-6902 (the three for which TNS is the RespOrg), and 800-523-0527, 800-533-4488, 877-488-0467, and 877-488-0757 (for which Verizon is the RespOrg).

have a federal district court in Arizona clarify that, since the toll free line referenced in the arbitration award does not actually exist, the award should be interpreted to require the creation of a new exclusive toll free number for EPS merchants' payment card transactions. However, that request for clarification was also denied, and TSYS has appealed that decision to the U.S. Court of Appeals for the 9<sup>th</sup> Circuit, where the appeal is currently pending.

As it became clear in the course of these various court proceedings that there was no existing toll free number dedicated exclusively to EPS merchants, and that EPS merchants were using seven different TSYS numbers shared with over 750,000 non-EPS merchants, EPS altered its approach and argued that the only way to satisfy the arbitration award is to require TSYS to transfer all seven toll free numbers to EPS. The federal district court agreed that this is what EPS seeks, stating:

[TSYS] asserts that the newly discovered evidence – namely, the disagreement between the parties concerning the meaning of the award of the 1-800 number – did not come to light until October 2009. The Court disagrees. The arbitrator issued his award in January 2009. It is clear from the face of the award what the arbitrator ordered: that [TSYS] turn over control of the numbers that connect [EPS's] customers to a processor. [TSYS] focuses on the word *the*, but misses the thrust of the arbitrator's finding and conclusion; namely, that [EPS] is to be awarded control over its merchants in the event [EPS] decides not to retain [TSYS's] services. It was not the goal of the arbitrator, as mentioned throughout his award, to award [EPS] a single telephone number; *rather, [EPS] was seeking ownership and control of the numbers its merchants use.*<sup>3</sup>

EPS is now seeking to enforce the toll free number aspect of its arbitration award through federal district court actions. It has filed a Motion to Compel in an Arizona federal district court seeking an order requiring TSYS to deliver "ownership, control and access" to the seven toll free numbers discussed above. **The hearing for the court to consider that motion is scheduled for**

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<sup>3</sup> *TSYS Acquiring Solutions, LLC v. Electronic Payment Systems, LLC*, 2010 WL 1781015 (D. Ariz. 2010), at \*5 (brackets in original; first emphasis in original, second emphasis added).

**January 25, 2011.** TSYs has filed a motion to stay further proceedings pending resolution of its appeal in the U.S. Court of Appeals for the 9<sup>th</sup> Circuit, and is filing a supplemental motion requesting that the court stay any further actions with regard to the toll free numbers while the FCC exercises its exclusive jurisdiction over that subject matter to address the issues raised by the actions of EPS. These motions will also be considered by the court at the January 25<sup>th</sup> hearing. However, whether the stay is granted does not affect the need for Commission action here. Instead, it merely affects how quickly the FCC needs to respond to enforce its rules and prevent widespread harm. If the stay is not granted by the court, expedited action from the Commission is critical to preserving the integrity of the Commission's Rules and the SMS/800 Tariff (the "Toll Free Tariff"), as well as to avoid immense harm to the public and innocent third parties.

Compounding the need for prompt action, EPS recently served a Writ of Execution on TNS, one of TSYs's two RespOrgs, through the U.S. District Court for the Eastern District of Virginia. A copy of the Writ is attached hereto as Exhibit 1. The Writ informs TNS that it must hand over

the goods and chattels, lands and tenements in your district belonging to:  
TSYS Acquiring Solutions, LLC and held by Transaction Network  
Services, Inc. and set forth in Schedule A attached hereto.

Schedule A of the Writ then lists the "Specific Property" to be turned over as "Toll-free numbers 800-370-8507, 877-488-0358 and 800-411-6902 and all documents necessary to provide Electronic Payment Systems, LLC with immediate and continuous ownership, control, and access to said numbers."

Shortly before serving the Writ on TNS, EPS submitted a declaration in support of its Motion to Compel from attorney Danny E. Adams of Kelley Drye and Warren summarizing his familiarity with the FCC and its rules affecting toll free numbers, and stating

Although there are no private property rights permitted in toll free numbers, the rights of a subscriber of record to access and control of a toll free number can be conveyed to another subscriber. For example, such conveyances are a common practice in corporate mergers and acquisitions. I have been involved in numerous transactions that included conveying the interest of one subscriber in toll free numbers to another subscriber.<sup>4</sup>

The Declaration fails to note, however, that no corporate merger is involved here, and that the transfer of toll free numbers being sought by EPS violates both the Commission's Rules and the tariff governing toll free numbers. It also fails to note that the FCC has exclusive jurisdiction over the disposition of toll free numbers.

Confirming that EPS's efforts at dark of night "property collection" regarding TSYS's toll free numbers is part of a continuing effort to circumvent the FCC's authority, EPS did not serve a copy of the Writ on TSYS. EPS apparently hoped it could spirit away the numbers before TSYS or the FCC became aware of its actions. TSYS only learned of the Writ when TNS contacted TSYS to ask about it. Given this lack of notice to TSYS, it is possible that EPS has tried a similar maneuver on TSYS's other RespOrg, Verizon. In response to inquiries from TSYS, Verizon currently indicates that it is unaware of receiving a similar Writ. However, should TSYS later discover that EPS has sought to similarly interfere with its relationship with Verizon, it will bring that matter to the Commission's attention as well.

Given these efforts by EPS to evade the requirements of the FCC at the expense of TSYS and the hundreds of thousands of local merchants that would be harmed if the toll free numbers

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<sup>4</sup> A copy of the Declaration is attached hereto as Exhibit 2.

were transferred to EPS, TSYS has filed this Petition to put a stop to EPS's illicit tactics and to bring the matter before the only governmental authority having the jurisdiction to bring it to a proper conclusion.

## **II. EPS Has Knowingly Sought to Circumvent the Commission's Authority Over Toll Free Numbering in an Effort to Enrich Itself at the Expense of the Public**

While the background provided above is meant to assist the Commission in understanding how the current state of affairs was reached, TSYS notes that none of this information is actually necessary for the Commission to respond to this Petition and thereby protect the public as well as the integrity of the Commission's jurisdiction and rules. TSYS does not seek to draw the Commission into any legal dispute with EPS over monetary awards, but merely to have the Commission affirm with regard to toll free numbers that they are not, as EPS contends, property to be foreclosed upon, and that EPS's efforts to circumvent the FCC and the FCC's prohibition on subscriber transfers of toll free numbers are improper and contrary to the public interest.

Such a confirmation will ensure that TNS (and Verizon), as TSYS's RespOrgs, are not deceived or intimidated by EPS into illegally transferring toll free numbers, or possibly subjected to liability if they do not. It will also bring closure to that particular issue in the EPS court proceedings by clarifying that the relief doggedly pursued by EPS is legally unavailable, and that EPS only wastes the courts' and the parties' time as it pursues an impossibility. As stated above, TSYS has already satisfied the monetary portion of the arbitration award, so the sole matter remaining, namely the transfer of the toll free number(s), lies squarely in the exclusive jurisdiction of the Commission.

More pointedly, this confirmation by the Commission will put an end to EPS's surreptitious efforts to bypass the Commission. As its recent conduct confirms, EPS is certainly

aware that the Commission and its toll free rules represent a hurdle that it cannot possibly clear, hence its efforts to just go around the FCC.

First, it is incontrovertible that the Commission has sole authority over this matter. The FCC has noted that “[t]he Communications Act of 1934, as amended by the Telecommunications Act of 1996, gives the Commission exclusive jurisdiction over ‘those portions of the North American Numbering Plan that pertain to the United States.’”<sup>5</sup> This includes toll free numbers. More specifically, “[u]nder the Communications Act, the Commission has exclusive jurisdiction to administer numbering resources, as well as a statutory mandate to promote the safety of life and property. The Commission has long recognized that toll free numbers are a scarce public resource and are not the property of the individual entities to which they are assigned. *The assignment of toll free numbers is ultimately subject to the Commission’s direction.*”<sup>6</sup>

EPS is certainly aware of this, as the attorney that served as a declarant in support of its Motion to Compel, Danny E. Adams, also served as counsel to one of two the principal parties in the FCC proceeding that generated the quote immediately above.<sup>7</sup> It is apparently because of this knowledge that his Declaration is so ambiguously worded, noting merely that transfers of toll free numbers are permitted in the merger context (which bears no relation to the purpose of the court proceeding).

Recognizing that the FCC prohibits the very relief it is seeking – the transfer to a third party of toll free numbers – EPS intentionally sought to game the system and evade the FCC’s

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<sup>5</sup> *Toll Free Service Access Codes*, 13 FCC Rcd 9058 (1998) (quoting 47 U.S.C. §§ 1 and 251(e)(1)) (citations omitted).

<sup>6</sup> *U.S. Department of Health and Human Services Substance Abuse and Mental Health Services Administration Petition for Permanent Reassignment of Three Toll Free Suicide Prevention Hotline Numbers*, 24 FCC Rcd 13022 (2009) at ¶ 12, *vacated and remanded on other grounds*, *Kristin Brooks Hope Center v. FCC*, 626 F.3d 586 (DC Cir. 2010) (emphasis added) (footnotes omitted) (see *In re Toll Free Service Access Codes*, 21 FCC Rcd 9925 (WCB 2006), at ¶ 4 for nearly identical language).

<sup>7</sup> See *id.* at n.21.

authority by having a federal court issue a Writ of Execution against TSYS's RespOrg, TNS. In doing so, EPS obviously was seeking to improperly use a federal court's authority to intimidate TNS into violating the Commission's Rules by transferring TSYS's numbers to EPS in the dark of night. EPS elected not to serve or notify TSYS, despite its continuing litigation with TSYS, apparently in hopes that the unlawful deed would be done before TSYS could move to prevent it.

As it has become clear that EPS has no intention of seeking to present its hoped-for remedy to the FCC, where it knows it will not like the answer, TSYS, by this Petition, seeks to bring the FCC to EPS, and thereby bring this matter to a prompt lawful conclusion.

### **III. The Commission Has Made Clear That the Transfer of Toll Free Numbers Between Unaffiliated Subscribers Is Not Permitted**

Because toll free numbers are a "scarce public resource", the Communications Act of 1934, as amended, "requires the Commission to 'ensure the efficient, fair, and orderly allocation of toll-free numbers.'"<sup>8</sup> Therefore, "[c]onsistent with this regulatory framework, toll-free numbers are made available to end users on a first-come, first-served basis unless otherwise directed by the Commission."<sup>9</sup> "In addition, the Commission has created regulations and emphasized the importance of guarding against warehousing, hoarding, and brokering of toll-free numbers to ensure that numbers are made available on an equitable basis."<sup>10</sup>

To ensure that toll free numbers are equitably distributed consistent with the first come, first served requirement, the Commission prohibits toll free numbers from being transferred between unaffiliated subscribers, instead requiring that a party who no longer wishes to use a particular toll free number return it to the SMS/800 database so that the number can be made

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<sup>8</sup> *Toll Free Service Access Codes*, 22 FCC Rcd 651 (WCB 2007), at ¶ 7 (quoting *Toll Free Service Access Codes*, 12 FCC Rcd 11162 (1997), at ¶ 18 and referencing 47 U.S.C. §§ 151 and 251(e)).

<sup>9</sup> *Id.* at ¶ 8 (citing 47 C.F.R. § 52.111).

<sup>10</sup> *Id.* at ¶ 7 (citations omitted).

available on a first come, first served basis to others wishing to use it. Permitting a toll free subscriber to transfer its number directly to another subscriber encourages speculation and hoarding of toll free numbers, thereby wasting a scarce public resource.

In seeking to prevent such improper transfers, the Commission's Common Carrier Bureau in 2000 ordered modifications to the SMS/800 database through which numbers are reserved, stating:

The Commission's Common Carrier Bureau has increasingly received reports that toll-free numbers are being unlawfully transferred between subscribers.... Accordingly, with this letter, the Bureau is directing DSMI to make changes to the Disconnect Status and Suspend Status functions in the SMS/800 database that will be consistent with existing regulations and that may help preclude such unlawful number transfers. These changes will make it substantially less likely that RespOrgs are able to use the SMS/800 to effectuate transfers that are contrary to our rules.

The Commission's toll-free regulations, which are published in the Code of Federal Regulations at 47 C.F.R. section 52.101 *et seq.*, do not provide for toll-free numbers to be transferred directly from one subscriber to another. In particular, the "lag time" regulations at section 52.103 provide only for numbers to be returned to Spare Status when subscribers no longer use them. Also, the "hoarding" regulations at section 52.107 prohibit selling a toll free number for a fee. These rules implement the Commission's policy that numbers must be made available to subscribers on a "first come, first served" basis. Direct transfers of numbers between subscribers contravene the lag time and hoarding rules and violate the "first come, first served" policy.

The SMS Tariff similarly does not permit toll-free numbers to be transferred directly between subscribers, consistent with the Commission's regulations. It provides, among other things, that all entities (e.g., RespOrgs, subscribers, service providers) are prohibited from releasing any toll-free number "for a fee or otherwise" (section 2.3.1(A)(7)). Notably, the tariff prohibits RespOrgs from performing any functions using the SMS/800 which are not expressly provided for under the tariff (section 2.2.1), and no section of the tariff provides for transferring numbers directly between subscribers. The tariff also provides that the services provided under the tariff may not be used for any unlawful purpose (section 2.2.2), and violations of the Commission's regulations are unlawful.



*In re Modifying SMS/800 Disconnect and Suspend Status Functions to Preclude Transfers of Toll-Free Numbers Directly Between Subscribers*, 15 FCC Rcd 24053, 24053-54 (CCB 2000) (“CCB Letter”) (footnote omitted).

The references in the *CCB Letter* to the prohibitions on transfers in the Commission’s Rules and the Toll Free Tariff remain accurate, except that the Tariff’s prohibition on releasing toll free numbers “for a fee or otherwise” is now found at Section 2.3.1(A)(8).

EPS should certainly be well aware of the Commission’s prohibition on transfers between unaffiliated subscribers. In a pleading on behalf of a different party before the FCC in 2006, EPS’s expert declarant, Danny E. Adams, not only noted, but proclaimed this prohibition several times:

“The Commission has also repeatedly emphasized that the FCC’s rules and the SMS/800 Tariff prohibit the transfer of toll free numbers between end users, particularly over the objection of the subscriber of record.”<sup>11</sup>

“Initially, this agreement was to include the transfer of the numbers to [a second party]. However, after consultation with counsel, KBHC learned that such direct transfers of toll free numbers between end-users are unlawful.”<sup>12</sup>

“The Commission’s toll free number regulations, published in the Code of Federal Regulations at 47 C.F.R. section 52.101 *et seq.*, do not provide for toll free numbers to be transferred directly from one subscriber to another subscriber. In fact, they affirmatively prohibit such transfers ....”<sup>13</sup>

In short, EPS’s objective in seeking to force the transfer of TSYS’s toll free numbers to EPS is unlawful, and if EPS was not aware of that before, it certainly would have become aware of it after retaining Danny E. Adams as its expert declarant. In spite of that, however, it proceeded with its scheme to improperly use a Writ of Execution to pressure TNS into handing

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<sup>11</sup> *In the Matter of Kristin Brooks Hope Center and 1-800 Suicide*, Petition for Cease and Desist Order and for Sanctions Against Patriot Communications LLC and McLeodUSA Incorporated, CC Docket No. 95-155 (Dec. 15, 2006), at ii.

<sup>12</sup> *Id.* at 5.

<sup>13</sup> *Id.* at 9-10 (citing the *CCB Letter*).

over the TSYS numbers without involving (or even notifying) TSYS or the FCC. Grant of this Petition will help to ensure that EPS is not rewarded for its efforts to subvert the judicial process in order to accomplish an unlawful result.

**IV. No Basis for Violating the First Come, First Served Rule Exists Here, Whereas the Harm to the Public Caused by a Transfer of TSYS's Toll Free Numbers to EPS Would Be Substantial**

**A. The Commission Has Rarely Authorized the Transfer of a Toll Free Number, and Only in Life and Death Circumstances**

As a result of the Commission's exclusive jurisdiction over toll free numbering, and because "[t]he assignment of toll free numbers is ultimately subject to the Commission's direction,"<sup>14</sup> a toll free number may be transferred between unaffiliated parties only at the direction of the FCC,<sup>15</sup> and only where the FCC has found that "this deviation from the first-come, first-served rule was warranted [by an] extraordinary situation, and was in the public interest because it fulfilled Congress's command to 'promot[e] safety of life.'"<sup>16</sup>

Only once in history has the FCC successfully utilized its authority to direct the transfer of a toll free number between subscribers. The FCC summarized this situation when it attempted to exercise this authority a second time:

the Commission has only once formally directed the assignment of a toll free number and, in that instance as well, that assignment was necessitated by public safety concerns. In the *Red Cross Permanent Reassignment Order*, the Commission found that, in the wake of Hurricanes Katrina and Rita, "permanent assignment of 1-800-RED-CROSS to the American Red Cross will serve the overwhelming public interest in assisting the disaster

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<sup>14</sup> *U.S. Department of Health and Human Services Substance Abuse and Mental Health Services Administration Petition for Permanent Reassignment of Three Toll Free Suicide Prevention Hotline Numbers*, 24 FCC Rcd 13022 (2009) at ¶ 12, vacated and remanded on other grounds, *Kristin Brooks Hope Center v. FCC*, 626 F.3d 586 (DC Cir. 2010) (footnote omitted).

<sup>15</sup> See 47 C.F.R. § 52.111.

<sup>16</sup> *U.S. Department of Health and Human Services Substance Abuse and Mental Health Services Administration Petition for Permanent Reassignment of Three Toll Free Suicide Prevention Hotline Numbers*, 24 FCC Rcd 13022 (2009) at ¶ 33, vacated and remanded on other grounds, *Kristin Brooks Hope Center v. FCC*, 626 F.3d 586 (DC Cir. 2010) (first brackets added, second brackets in original) (footnotes omitted).

recovery efforts of the Red Cross related to hurricanes and other natural disasters.” In that case, as in the present case, there were “compelling public health benefits” in deviating from a first-come, first-served rule and reassigning toll free numbers from one organization to another.<sup>17</sup>

Notably, in addition to the life and death nature of the transfer of a toll free number in the *Red Cross* case, the existing subscriber in *Red Cross* did not object to the transfer, and in fact was reimbursed by the Red Cross for its expenses in releasing the number.<sup>18</sup> None of those factors exist here.

Only once since the *Red Cross* case has the FCC found a sufficient danger to life that it sought to violate its first come, first served policy and order the transfer of a toll free number between subscribers. That occurred when the subscriber for a number of toll free suicide prevention hotline numbers, including 1-800-SUICIDE, lost its funding to continue providing suicide prevention services. In response, “the Substance Abuse and Mental Health Services Administration (SAMHSA), a component of the United States Department of Health and Human Services (HHS), [asked the FCC] to reassign permanently three toll free numbers used as suicide prevention hotlines from the Kristin Brooks Hope Center (KBHC) to SAMHSA.”<sup>19</sup>

Faced with the risk that calls from members of the public contemplating suicide would go unanswered, the Commission stated that

In this highly unusual situation, the Commission must exercise its plenary numbering authority to deviate from its first-come, first-served rule with respect to the assignment of toll free numbers. Such deviation is necessary in this extraordinary circumstance to promote the public safety goal of suicide prevention.<sup>20</sup>

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<sup>17</sup> *Id.* at ¶ 13 (footnotes omitted).

<sup>18</sup> See *Toll Free Service Access Codes*, 21 FCC Rcd 9925 (WCB 2006), at n.10 (cited herein as *Red Cross*).

<sup>19</sup> U.S. Department of Health and Human Services Substance Abuse and Mental Health Services Administration *Petition for Permanent Reassignment of Three Toll Free Suicide Prevention Hotline Numbers*, 24 FCC Rcd 13022 (2009) at ¶ 1, vacated and remanded, *Kristin Brooks Hope Center v. FCC*, 626 F.3d 586 (DC Cir. 2010) (footnote omitted).

<sup>20</sup> *Id.* (footnotes omitted).

The Commission further noted that “a disconnection of these toll free numbers could have left approximately 30,000 callers a month without assistance.”<sup>21</sup> It also acknowledged that previously the Wireline Competition Bureau had

temporarily reassigned the Suicide Prevention Hotline numbers from KBHC to avoid an imminent public safety crisis. Specifically, the Bureau sought to minimize the potential loss of life due to callers in need being unable to connect immediately with a local crisis center that could dispatch emergency services.<sup>22</sup>

Finding that “there would have been a grave risk for thousands of Americans in distress yet unable to connect directly to counselors,”<sup>23</sup> the Commission authorized the transfer, stating “this deviation from the first-come, first-served rule was warranted in this extraordinary situation, and was in the public interest because it fulfilled Congress’s command to ‘promot[e] safety of life.’”<sup>24</sup>

The existing subscriber, claiming to have resolved its financial issues, appealed the Commission’s decision to the U.S. Court of Appeals for the D.C. Circuit. This past month, the Court granted that appeal, vacating the Commission’s decision reassigning the toll free numbers as “arbitrary and capricious.”<sup>25</sup>

Thus, even where matters of life and death are involved, the bar for transferring toll free numbers is quite high. Stated differently, only once has the FCC successfully authorized the reassignment of a toll free number to a different subscriber, and it has never done so over the objection of the existing subscriber.

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<sup>21</sup> *Id.* at 4 (footnote omitted).

<sup>22</sup> *Id.* at ¶ 13 (footnotes omitted).

<sup>23</sup> *Id.* at ¶ 27.

<sup>24</sup> *Id.* at ¶ 33 (brackets in original) (footnotes omitted).

<sup>25</sup> *Kristin Brooks Hope Center v. FCC*, 626 F.3d 586 (DC Cir. 2010).

**B. Transfer of TSYS's Toll Free Numbers to EPS Would Cause, Not Prevent, Harm to the Public**

Unlike *Red Cross*, EPS cannot claim that its efforts to take possession of the three numbers for which TNS is the RespOrg, or the four numbers for which Verizon is the RespOrg, will prevent loss of life. Nor can it claim that the existing subscriber does not object to EPS's efforts to abscond with those numbers. That, along with the fact that EPS has not even requested that the FCC authorize such a transfer, permits the FCC to put an end to EPS's illicit efforts at circumventing the Commission's Rules. However, TSYS would like to clarify exactly what is at stake were EPS to succeed in its efforts.

As the Commission has noted "[i]n the judicial context, it is an 'age-old principle that in formulating equitable relief a court must consider the effects of the relief on innocent third parties.'"<sup>26</sup> The transfer of TSYS's toll free numbers would harm literally hundreds of thousands of businesses throughout the U.S., and an even larger number of consumers, who would be unable to make payment card purchases at these merchants.

As noted above, TSYS has no contractual relationship with the merchants whose payment card readers utilize TSYS's toll free numbers to obtain authorization for individual payment card transactions. Whether talking about the over 550,000 merchants that use the three TNS-managed numbers, or the over 750,000 merchants that use one of the seven numbers EPS seeks to possess, TSYS has no contractual ability to require those merchants to reprogram their payment card readers to dial different toll free numbers, or even to stop dialing the existing numbers.

As a result, if EPS acquired just the three numbers it has sought to obtain via the Writ served upon TNS, it would be receiving over *70 million calls per month* from merchant's

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<sup>26</sup> *DeMoss v. Sprint Communications Company, L.P.*, 23 FCC Rcd 5547 (EB 2008), at ¶ 31 (footnote omitted).

payment card readers trying to reach TSYS. However, instead of reaching TSYS, those calls would be going to EPS, an entity that has no capability (nor right) to process those payment card transactions.

Besides confounding hundreds of thousand of merchants and millions of consumers trying to complete payment card transactions, these consumers and merchants would be exposing confidential information to EPS, violating federal and state consumer privacy and confidentiality statutes, as well as other payment card industry data security standards and requirements, and exposing millions of innocent third parties to a heightened risk of fraud and identity theft.

Unfortunately, there is no practical way for TSYS to download new numbers into merchants' payment card readers. Information downloads to such equipment are rare, and it is common that a payment card reader would not have had any information downloaded into it since it was installed. As a result, there is no "automatic" way of updating the numbers. Instead, TSYS would have to attempt to individually contact each of those 750,000 merchants, request that they take the steps necessary to download new numbers, and if they agree, assist them in performing the download.

However, as noted above, TSYS has no contractual ability to force a merchant to download new toll free numbers into its payment card reader, and because of that, typically does not have merchants' contact information to request that they take the steps necessary to download new numbers. As a result, many merchants would only be "notified" when their payment card reader stops functioning and they take steps to learn why they are unable to process their customers' payment card transactions. In addition, seasonal merchants connect their payment card equipment for only a month or two each year, and therefore would not realize

their predicament until they desperately needed to be processing payment card transactions and found they could not.

Even if all of these problems could be overcome, and TSYS was able to contact 750,000 merchants who turned out to be available and cooperative, the process of doing so and of downloading new toll free numbers into their equipment would literally take years. With over One Billion transactions per year being handled over the toll free numbers EPS seeks, the economic harm and disruption that would be caused under the best of circumstances is immense.

Moreover, the payment card processing failures would place numerous parties involved in the transaction process, including TSYS, in violation of their contracts to provide reliable and secure payment card transactions, harming everyone and, as discussed below, benefitting no one.

In short, EPS can demonstrate no harm to life and safety if TSYS's numbers remain with TSYS, but the harm to merchants, consumers, and the economy from transferring those numbers to EPS is obvious. EPS recognizes this, and it is apparently for this reason that its aggressive pursuit of those numbers has assiduously avoided the only authority having jurisdiction over toll free numbers – the FCC – in favor of Writs and other inappropriate collection efforts.

**V. EPS's Efforts to Force the Transfer of Seven Toll Free Numbers Raise Concerns That It Is Seeking to Violate the Commission's Prohibitions on the Hoarding and Brokering of Toll Free Numbers**

So why is EPS so intent upon "collecting" TSYS's toll free numbers? The simple answer is there is no *legitimate* reason. Its original claim was that it wanted its merchants to have an EPS-exclusive toll free line so that it would have the freedom to redirect that number (and therefore its merchants' calls) to a different processor without having to modify its merchants' payment card readers to dial the new processors' number. However, that claim is a red herring, and baseless.

First, as the discussion above demonstrates, TSYS could no more transfer a toll free number (whether EPS-exclusive or not) to a new processor than it could transfer the existing numbers to EPS. Such a transfer would violate the FCC's Rules.

Second, even if EPS could ignore that fact (and it has obviously tried to), the software in its merchants' payment card readers only speaks the proprietary language of "TSYS". Other processors use different data and data formats to transmit their payment card transactions. Merely redirecting the calls of EPS merchants to a different processor would accomplish nothing. That processor's equipment would not be able to "speak" with the EPS payment card readers. The only way of fixing this is to download the new processor's software into the EPS payment card readers. As a result, EPS would have to require its merchants to perform a download regardless, and including a new toll free number in that download is a trifling matter. In fact, it is standard operating procedure, since the change to a new processor invariably involves converting not just to that processor's software, but to its toll free numbers as well.

Moreover, EPS, unlike TSYS, has a direct contractual relationship with its merchants and therefore has the means to require its merchants to accept such a download. Stated differently, if EPS pointlessly wants all of its several thousand merchants on an exclusive toll free number, it can easily accomplish that. In contrast, TSYS has no practical way of migrating over 750,000 merchants off of the TSYS numbers.

If these facts alone were not sufficient to raise questions as to EPS's intent, it is worth remembering that TSYS continues to be EPS's processor. Therefore, disruption of TSYS's payment card processing capabilities on the seven toll free lines used by EPS merchants would cause EPS's merchants to suffer the same disruption in payment card processing as every other merchant using those numbers. Given that the only reason provided by EPS for wanting TSYS's



numbers is to avoid the disruption of a download for its merchants if EPS changes processors, transferring the TSYS numbers to EPS would cause, not prevent, disruption to EPS merchants.

So if taking the TSYS numbers will not benefit EPS or its merchants, and in fact will harm the EPS merchants along with hundreds of thousands of other merchants, why has EPS rejected TSYS's offer to set up a new and exclusive toll free line for EPS merchants to satisfy the arbitration award? The answer is obvious.

First, EPS is not equipped to be a payment card processor, particularly for the volume of transactions traveling over the TSYS numbers. It therefore has no real use for the numbers.

Second, the TSYS numbers are not "vanity numbers" that are attractive in and of themselves for marketing reasons (i.e., 1-800-CREDIT-CARD), so there is no reason to seek any of these particular numbers in order to apply them to a different business. It would be far easier to just reserve a new toll free number, and EPS might find some vanity numbers are available that would be more useful than the TSYS numbers anyway.

Third, even if EPS was interested in repurposing the seven numbers for use by its own merchants, EPS merchants represent far less than 1% of the call volume on those TSYS numbers. As a result, it could consolidate all of its merchants on a single number and that number would still be receiving just a fraction of the calls any of the TSYS numbers currently receive. EPS does not need seven toll free numbers.

That being the case, the only reason for EPS to seek the transfer of the seven TSYS numbers is for the purpose of hoarding them. Hoarding is a violation of the FCC's Rules. *See* 47 C.F.R. § 52.107. The FCC has referred to hoarding as "a toll free subscriber acquiring more